An Instruction Manual to Stop a Judicial Rebellion (before it is too late, of course)

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Daniel Sarmiento Do 2 Feb 2017

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2016 was not a good year for the EU. In fact, it was not a good year for the world in general, but the EU has taken quite a good beating compared to other regions. Brexit was terrible news for European integration (the ever closer Union backtracks for the first time). The arrival of Donald J. Trump to the US presidency, hailed by cheerleaders of the likes of Le Pen, Farage, Wilders and Petry, doesn't spell any good for the Union. Growth continued to be stagnant and unemployment still soared in many southern Member States. Italy, where a growing eurosceptic ambiance has taken hold of the political discourse, is a source of growing concern. Poland and Hungary carry on with their illiberal anti-EU agendas, to the dismay but cowardly attitudes of other Member States.

In the meantime, one of the EU's proudest achievements, its judiciary, has shown the first signs of worrying instability.

On 21 June 2016 the German Constitutional Court green-lighted the European Central Bank's OMT programme, after having made a reference of validity to the Court of Justice. Many reacted with relief, but the reasoning of the German court's judgment was hardly a consolation for the Luxembourg court. Throughout its reasoning, the German court shows its deep discontent with Luxembourg's decision, its arguments, its approach towards judicial review, its lack of respect towards the question that was actually put by the German court, and several other grievances. If anybody interpreted the OMT judgment of the German Constitutional Court as a positive sign for the future, I would recommend them to read the judgment twice.

On 6 December 2016 the Danish Supreme Court ruled that non-written general principles of EU Law are not binding in the Danish legal order. The Danish court interpreted strictly the Danish Accession Act and came to the conclusion that the Court of Justice's activist stance towards general principles has no legal base in the Treaties. Despite the fact that the Court of Justice had recently ruled on the case at hand, giving clear instructions to all Danish courts, the Supreme Court decided that such guidance was not binding. Mangold and Kükükdeveci are no longer the law of the land in Denmark.

In the meantime, the Italian Constitutional Court was struggling with a judgment of the Court of Justice (Taricco), to such a point that on 26 January 2017 it made a reference openly inviting the Court of Justice to overrule its past decision. The Italian court had a good point: The judgment in Taricco imposes on the Italian legal system the setting-aside of a rule on time-limitations that would allow the reopening of criminal proceedings that had been, until Taricco, time-barred. According to the Italian court, this is not a mere procedural issue, it is quite substantive and relevant for the accused. From the perspective of human rights protection, the Italian Constitutional Court seems to be quite horrified, but at least it had the deference of making a reference.

One could argue that these are just sporadic and individual decisions of activist and nationalist courts, and that the Court of Justice is right in standing firm and putting things in their proper place. Unfortunately, it is rather more complex and worrying than all that.

All three decisions have one point in common: all three of them are strongly reacting to three different judgments of the Court of Justice. They are all unsatisfied national supreme and constitucional courts with the Court of Justice's decisions. The German Constitutional Court is unimpressed with the quality of the reasoning of the Court of Justice in the OMT ruling. The Danish Supreme Court is upset with the activism of the Court of Justice in Danks Industri and others. The Italian Constitutional Court is horrified with the approach towards fundamental rights of the Court of Justice in Taricco. I would not say that these are nationalist overreactions. These are worrying (and I would add justified) signs of something going wrong.

Unfortunately, I must admit that all three courts have a point.

The OMT judgment of the Court of Justice arrives (in my opinion) at the right outcome, but its reasoning is nothing close to rocket-science. Considering the challenge raised by the German Constitutional Court, particularly on the ultra vires test, the reply of the Court of Justice sounds bureaucratic and dull. The passages on inadmissibility, where the Court of Justice deals with the German Constitutional Court's threat of setting aside a judgment coming from Luxembourg, are blunt and uncompromising, but lacking hardly any reasoning. The factual analysis of the case is practically non-existent, despite the complexity of the file and the underlying problem. I insist that the Court of Justice reached the right solution, but I also confess that the German Constitutional Court's critique, particularly on the point of the intensity of judicial review, is not completely unfounded.

The Danish Supreme Court's reaction to the Danske Industri case is also unsurprising. The Court of Justice has stuck to its Mangold case-law quite firmly, but during this time it has hardly refined it or struggled to explain why it works and when does it not. The reasoning of Association de Médiation Sociale, where the Grand Chamber had the chance of explaining the limits of the Mangold case-law, was unanimously perceived as a disappointment. No wonder the Danish Supreme Court finds itself unimpressed when reading Danske Industri. In the past ten years, the Court has been applying a sort of "Brexit means Brexit" approach towards Mangold: "Mangold means Mangold", but, alas, national courts need something more than that before making a leap of faith.

But the most worrying reaction is the Italian one. Taricco is a powerful decision of the Court of Justice rendered by the Grand Chamber, but its reasoning is based on a fragile premise: that time-limitations in criminal liability are a question of procedure and not of substance. The Court of Justice argued that extending a time-limitation (because it is too short) does not necessarily prejudge the criminal liability of the accused, which is indeed true. However, the impact that this decision might have in the domestic criminal system is enormous, and the reopening of criminal procedures, once time-barred, raises serious doubts in the light of fundamental rights. The financial interests of the Union are relevant, to be sure, but the legal certainty of citizens, particularly in criminal proceedings, is no minor thing. The Italian Constitutional Court is right in giving the Court of Justice a second chance, but the fact that it is making the reference is good proof that there is something wrong with the judgment in Taricco.

The Court of Justice has never been so questioned by those who are supposed to empower it and justify its role: national supreme and constitutional courts. 2016 has proved that the relationship between Luxembourg and its national counterparts is not going through a good time, but this could only be the beginning of a long and painful trend of rebelliousness and dissatisfaction from national courts.

So what should the Court do? Stand firm and hope for the best? Back down and show deference? Act as if nothing has happened and carry on with its own business?

Probably none of the above.

It is wise to stand firm when you are sure that you have taken the right decision, but it's not so easy when your decision might be wrong. That's probably the case in Taricco. On the other hand, improving the reasoning of a case-law is not a question of standing firm, it's simply a question of doing a better job drafting judgments and explaining them. I believe that the Danish Supreme Court's reaction has quite a lot to do with all that. And paradoxically, the Court of Justice is also being asked to take a tougher stance, particularly when it comes to complex technical analysis. This does not require to stand firm. It demands a *firmer* stance, and this is what the German Constitutional Court is asking from Luxembourg in the OMT judgment.

Therefore, it's difficult to reconcile all the demands coming from these three upset national courts. But something has to be done, and it has to be done fast before it is too late.

In my opinion, the Court of Justice would be wise to be more empathetic towards national supreme and constitutional courts. Some will say that the Court already does that, but I think it does not, or not in the way I have in mind.

Take one example: in Gutierrez Naranjo, the Grand Chamber of the Court of Justice has recently stated that all Spanish courts have to set aside a judgment of the Spanish Supreme Court which limited the temporal effects of the nullity of an abusive clause in a consumer contract. The Spanish Supreme Court didn't come to that conclusion simply because it was incompetent, arbitrary or naïve. It took that decision in 2013, right in the middle of the Spanish financial assistance programme, shortly after avoiding a complete bail-out of the country. The judgment concerned real-estate mortgage contracts, and thus the impact of the judgment fell entirely on the struggling Spanish banking system at the time. The Central Bank of Spain issued a report stating that a full retroactive judgment would have required another financial assistance programme, and thus the Supreme Court, with good sense, decided to limit the temporal effects of its judgment. The consumers were paid back in part, but the country avoided another painful rescue programme (and further conditionality, and further recession and further unemployment… should I carry on?).

The Court of Justice ruled in Gutierrez Naranjo simply stating that a nullity under Directive 93/13 cannot be limited in time. Period. No regard whatsoever to the circumstances of the case, to the circumstances back in 2013, to the reasons why the Supreme Court came to such a conclusion. Nothing. Brexit means Brexit. Mangold means Mangold. A nullity means a nullity.

The reader can just imagine how happy the judges at the Spanish Supreme Court are now with the Court of Justice, so he or she will not be surprised if sooner rather than later the Court of Justice finds another sign of rebellion from yet another supreme court of another Member State.

So is this all about deference towards national courts? Definitely not. It is about making careful and well-thought decisions that *persuade* national courts. The Court of Justice and national supreme courts are not antagonists, they share the same task of interpreting and upholding the law. But interpretation among different legal cultures will demand special attention towards the courts that are more strategically located. And to simply tell them that my decision stands because I have the authority, is a risky way of flirting with disaster.

Taricco was a preliminary reference made by an Italian first instance court. The Court of Justice would be wise to revisit its decision if none other than the Italian Constitutional Court considers that there is something wrong with the judgment. To simply reinstate what was said in Taricco and make the Italian Constitutional Court look like a fool is definitely not the way forward.

Danske Industri was a rather boring judgment that simply repeated what had been said in the past. A proper reaction to the Danish Constitutional Court's decision would be to make a little effort when dealing with Mangold, Kükükdeveci and the like. If another Association de Médiation Sociale arrives in Luxembourg, it would be helpful if the Court of Justice explained properly what are the limits of Mangold, of the Charter's social rights, and so on. It is not easy, of course, but if the Court of Justice is not willing to do so, who will?

Empathy is not deference, if it is done carefully and with care. But the current approach of the Court of Justice towards judicial challenges, asserting an authority by using the rationale of a "Mangold means Mangold", or "a nullity means a nullity" kind of approach, might be the quickest path towards a painful (yet, alas, avoidable) disaster.

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